Environmental Protection

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By Email
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United States Environmental Protection Agency
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Dear Mr. Schaaf:

Thank you again for meeting with us in December 2018 to discuss DEP's proposal to meet the Gowanus 2013 Record of Decision (ROD) CSO solids reduction requirement through a storage tunnel in lieu of storage tanks (Tunnel Alternative). We appreciate your interest in the proposal, which is cost-effective, will reduce impacts to the local community and lay the groundwork for future environmental and quality of life enhancements.

If EPA concurs in the concept of the Tunnel Alternative, we recognize that EPA must document its decision-making. We believe that because the Tunnel Alternative meets the critical element of the ROD – meeting the CSO solids reduction targets through storing and treating CSOs - the pivot to the tunnel is appropriately documented through EPA's issuance of an Explanation of Significant Difference (ESD). The Tunnel Alternative is equivalent to the scope, performance and cost of the tanks. Indeed, the Tunnel Alternative would achieve greater control of CSOs than the tanks, would do so at similar cost and would be implemented in a comparable timeframe. Further, an ESD would allow DEP to begin design and other tunnel-related work earlier – and closer to the current schedule for the CSO tanks. Finally, and as detailed below, EPA's guidance supports the use of an ESD under the facts presented here.

During our meeting, EPA staff noted that it was their understanding that the ROD must be amended to reflect the pivot from two CSO tanks to one CSO tunnel. While we believe that an amendment to the ROD is a possible avenue, the ESD is most appropriate and expeditious legal mechanism. However, should EPA determine that a ROD amendment is the preferred path, DEP believes that the amendment can be completed in one year. Below, we offer a timetable that would allow achievement of this timeframe.

The 2013 Record of Decision

The ROD sets forth EPA's decision for the remedial action of the ROD. While the ROD calls for twelve distinct remedial actions, there are three major

components of the remedial action: dredging of contaminated sediments from the Gowanus Canal, stabilization and capping of the canal sediments to prevent future migration of hazardous substances, and reducing solids from CSOs. *See* ROD, *Declaration for the Record of Decision,* pp. i-ii. EPA determined that a reduction of solids in the range of 58 to 74% would be required to meet the Preliminary Remediation Goals (PRGs) for PAHs, lead, copper and PCBs. *See Feasibility Study Report Addendum, Supplemental Evaluation of Remediation Goals, Gowanus Canal, Brooklyn, New York*, p. 19; ROD, p. 54.

To achieve these reductions, EPA selected a remedy that would utilize two CSO retention tanks – one in the vicinity of each outfall. EPA chose to use retention tanks because, according to EPA, "retention tanks" are the "only practicable, cost-effective measure" for reducing solids sufficiently to meet the remedial goals of the ROD. *See* ROD, p.54. Notably, EPA stated that the location and the sizes of the controls would be determined during the remedial design phase. *See* ROD, *Declaration for the Record of Decision,* p. iii.[1] The ROD notes that tanks near RH-034 and OH-007 were "preliminarily selected," and would be selected "unless other technically viable alternatives are identified." ROD, p. 55. Thus, the ROD incorporates expressly the concept of alternative control technologies to CSO tanks as part of the selected remedy.

Legal Framework and Analysis

The National Contingency Plan (NCP) gives EPA two options when new information or circumstances arise subsequent to the issuance of a Record of Decision that requires a change to the proposed remedial action. *See* 40 C.F.R. § 300.435(c)(2). If the differences in the remedial action "significantly change but do not fundamentally alter the remedy selected in the ROD with respect to scope, performance, or cost," then EPA may simply publish "an explanation of significant differences." *Id.* § 300.435(c)(2)(i). However, "if the differences in the remedial or enforcement action ... fundamentally alter the basic features of the selected remedy with respect to scope, performance, or cost," then EPA must propose an amendment to the ROD. *Id.* § 300.435(c)(2)(ii).

Per EPA guidance, a "significant change" to a remedy is a "change to a component of a remedy that does not fundamentally alter the overall cleanup approach."[2] By contrast, a "fundamental change" is "an appreciable change or changes in the scope, performance, and/or cost or may be a number of significant changes that together have the effect of a fundamental change."[3]

The City believes that the CSO tunnel alternative would be a "significant" rather than a "fundamental" change to the remedy selected in the 2013 ROD because it changes a *component* of the remedy, but does not fundamentally alter EPA's overall cleanup approach or Remedial Action Objectives or the scope, performance or cost of the remedy. Importantly, pivoting to a

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[1] *See also* 2013 ROD, p. 55 ("final selection of CSO control retention tank locations, as well as any further evaluations of measures to prevent recontamination of canal sediments, will be completed during the remedial design.")

[2] "A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents"; EPA 540 R 98 031, July 1999 (the "1999 Guidance"), at Section 7.2

[3] *Id.*

tunnel would not impact or delay other elements of the remedy (*e.g.*, in-canal dredging, capping, restoration of turning basins) called for in the ROD.

a. *Scope*

The City's proposed tunnel alternative would not fundamentally change the scope of the remedial action because the CSO controls would still be implemented in the same manner. Under the designs for both the tanks and the tunnel, CSOs are captured during wet weather events and stored until DEP's wastewater treatment plants have sufficient capacity to receive and treat them. At that point, the wastewater that has been captured and stored (in either the tanks or the tunnel) is pumped out of the tank/tunnel to a wastewater treatment plant, where it is treated and discharged. Thus, there is no change in the manner that CSO controls are managed other than the that there is one storage facility under the tunnel alternative as opposed to two storage facilities under the current tank design.

While the combination of the two tanks into one tunnel may be a significant change in the design of the facility that will store CSOs prior to treatment, it is not a fundamental change because it does not alter the approach set forth in the ROD, *i.e.*, solids reduction achieved via CSO storage followed by post-storm treatment. The closest example to this change set forth in the 1999 Guidance is the "Secondary Technology" example, where EPA states that a change from biological treatment of extracted groundwater to air-stripping is "significant" (but not fundamental) because the "basic pump and treat approach remains unaltered and the cleanup level specified in the ROD will be met by the alternative technology." Similarly, here the basic treatment approach remains unaltered.

b. *Performance*

Similarly, the CSO tunnel design does not fundamentally (or even significantly) alter the remedial action in terms of performance, as the tunnel would be designed to capture CSOs sufficiently to prevent the recontamination of the canal sediments from CSOs. *See* 2013 ROD, pp.54-55. The ROD determines that it would take specific reductions in CSO volumes – 58 to 74 percent reductions – to prevent recontamination. The proposed Tunnel Alternative would capture *more* volume of CSOs than the two tanks, and would capture an equivalent amount of CSO solids. Indeed, as currently designed, the two tanks would reduce CSO volumes by 78% at the RH-034 and OH-007 outfalls; under the tunnel, CSO volumes would be reduced by 89%, including 100% of CSOs at OH-007. Accordingly, the City believes the Tunnel Alternative, as proposed, would be as, or more protective of human health and the environment as the remedy originally set forth in the 2013 ROD.

c. *Cost*

Finally, the City does not believe that tunnel fundamentally alters the remedy in terms of cost so as to require a ROD Amendment. DEP estimates that the CSO tunnel would cost about the same as the CSO tanks, currently estimated at $1.2 billion, so there is no cost difference between the two remedial designs that would, on its own, warrant an ESD or ROD amendment. Nor does the

difference between the cost estimates in the ROD and the current estimates for either the tank or tunnel require an amendment to the ROD. *See United States v. P.H. Glatfelter Co.*, 768 F.3d 662 (7th Cir. 2014) ("EPA's position is that a change in cost alone does not fundamentally alter the remedial approach and thus does not require a ROD amendment.") EPA's guidance does not suggest that such a change would be "fundamental and lists only as "significant" a situation involving a "large increase in cost." *Id.* (*see* 1999 Guidance at Highlight 7–1. By contrast, the 1999 Guidance lists a number of examples of "fundamental" changes, but none of these are based solely on increased projected cost. Instead, the examples of fundamental changes tend to involve changes to the nature of the remedy, for example, from a soilwashing or natural attenuation remedy to an excavation remedy. *Id.* As noted above, the Tunnel Alternative does not involve a change to the nature of the remedy, and therefore is not analogous to any of the "fundamental" changes described by EPA.

Accordingly, the tunnel remedy would be equally cost-effective as the tank remedy set forth in the ROD. Moreover, because the tunnel has a number of co-benefits beyond meeting the requirements of the ROD (increased CSO capture, scalability for future stormwater reduction projects which could reduce local flooding and increase resiliency), the tunnel remedy is even more cost effective than the remedy set forth in the 2013 ROD.

Timeframe

We believe that an ESD could be finalized within six months of EPA's decision to proceed with the Tunnel Alternative. Pursuant to the NCP, if EPA decides to issue an ESD, EPA must make its explanation available to the public in the administrative record, and "[p]ublish a notice that briefly summarizes the explanation of significant differences, including the reasons for such differences, in a major local newspaper of general circulation." 400 C.F.R. § 300.435(c)(2)(i)(A)-(B). DEP has provided EPA with analyses that could form the basis of a publicly noticed ESD. Further, to the extent EPA requires additional information concerning the Tunnel Alternative, DEP will continue to work with EPA to provide such information that will further support the conclusion that the tunnel would not fundamentally alter the remedy in terms of scope, performance or cost.

During our December meeting, your staff suggested that a ROD Amendment would take two years. Should EPA decide to amend the ROD rather than issue an ESD, we believe that the amendment process, including DEP's preparation of a Supplemental Focused Feasibility Study (SFFS) to evaluate the tunnel remedy against the remedies studied in the original FFS, would take one year. Such a ROD Amendment can be accomplished in this timeframe because no additional sampling, data collection or site investigation will be required. Below is a schedule for meeting the one-year time period:

- Negotiation of Administrative Order on Consent for SFFS: 1 month
- DEP Preparation of SFFS Work Plan: 1 month
- EPA Approval of SFFS Work Plan: 1 month
- DEP Preparation and Submittal of Draft SFFS Report: 3 months
- EPA Preparation of Supplemental Proposed Plan: 1 month
- Public comment period: 2 months

- EPA Response to comments and issuance of ROD Amendment: 3 months

Total: 12 months

Conclusion

DEP believes that pivoting to a tunnel solution is the most cost-effective, beneficial and sustainable project to meet the CSO solids reduction requirements of the ROD, while providing both immediate benefits for the surrounding community as well as laying the groundwork for future benefits. An ESD is the appropriate technique for documenting this change because transitioning to a CSO tunnel would not fundamentally alter the scope, performance or cost of the remedy in terms of CSO control measures, and would not delay or otherwise impact any of the other components of the remedy. As always, we look forward to discussing this with you further.

Sincerely,

Elissa Stein Cushman

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Cc: Pete Lopez, EPA Regional Administrator

Vincent Sapienza, DEP Commissioner